87-598

No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

FRANK L. MARRAPESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

RICHARD M. EGBERT
(Counsel of Record)
260 Franklin Street
Boston, Mass. 02110
(617) 439-6020

EDWARD J. ROMANO
165 Atwells Avenue
Providence, R. I. 02903
(401) 273-5600

Attorneys for Petitioner
Frank L. Marrapese

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR BY FAILING TO REVERSE THE DISTRICT COURT'S RULING ON THE PETITIONER'S MOTION TO DISMISS THE INDICTMENT BASED ON EVIDENCE OF PROSECUTORIAL VINDICTIVENESS WHICH LED TO A VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

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Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on August 14, 1987.

—o—

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction in the United

States District Court, District of Rhode Island, is annexed as Appendix (App.) A.

JURISDICTION

The memorandum and order of the United States Court of Appeals for the First Circuit was entered on August 14, 1987. The mandate was issued on September 8, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND PRAYER FOR REVIEW

ARTICLE V

Presentment or indictment-Double jeopardy-Self-incrimination-Due Process-Compensation for private property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PRAYER FOR REVIEW

The petitioner avers that this Honorable Court should review this case. The case involves a situation wherein prosecutorial vindictiveness was alleged after three trials of one indictment (including the co-defendants), one trial involving the petitioner which ended in a deadlocked jury, and an intervening constitutional challenge to the instant grand jury selection process which threatened numerous indictments returned by at least three grand juries in the District of Rhode Island.

The petitioner avers that a superseding indictment which included an additional charge was based on this prosecutorial vindictiveness.

This Honorable Court has not yet decided a case involving prosecutorial vindictiveness following a deadlocked jury, and an intervening constitutional challenge to a grand jury selection plan and process.

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THE BASIS FOR FEDERAL JURISDICTION

In this case, the petitioner was charged with federal criminal offenses which constituted the basis for federal jurisdiction in the United States District Court for the District of Rhode Island.

———o———

STATEMENT OF THE CASE

The Petitioner was charged in the United States District Court for the District of Rhode Island with receipt of stolen goods "La-Z-Boy armchairs" in interstate shipment in *United States v. Marrapese* (Indictment CR. #82-049). His co-defendant was one Alfred Scivola. During the course of the trial, the Petitioner allegedly contacted William Smith, hereinafter referred to as "William", the brother of Alfred Smith, hereinafter referred to as "Alfred", a government witness in the same case, and attempted to elicit his testimony. The nature of this testimony was to support the Petitioner's alibi.

On January 20, 1983, William was allegedly invited to Mr. John F. Cicilline's law office to discuss this hoped for testimony with Mr. Cicilline and the Petitioner.

That evening, Government Agents (FBI) had placed a body recorder on William. During the course of the conversation, the Government alleged that John F. Cicilline and Frank L. Marrapese attempted to elicit false testimony from William. The January 20th tape and William were the bulk of the government's case.

On the January 20th tape, the Petitioner is heard outside Mr. Cicilline's presence, telling William that the "only defense" he and Mr. Scivola could raise in the stolen goods trial involves William's testifying that his brother Alfred had sold them to Mr. Marrapese and Mr. Scivola by representing that they were salvaged, not stolen. On the tape the Petitioner said "that's the best, the only thing we got to go on." During the meeting, the Petitioner explained that he wanted William to testify that his brother Alfred

called him in November 1981, and told him that he sold the chairs to the Petitioner, representing that the chairs were salvaged.

According to the tapes, a few minutes later, Mr. Cicilline joins Mr. Marrapese and William in the back room of the law offices and the Petitioner explained the putative defense.

At a subsequent point on the tape, Mr. Cicilline leaves the room. After the door to the office was closed, the Petitioner states to William: "This is between you and me. You got to understand this. Here's what I want from you, I want you to come down there . . . you're gonna have to tell three lies on the stand. Alright? Now no one can prove otherwise."

That statement proved to be the central focus of the government's case on the substantive count. (18 U.S.C., Sec. 1503). That tape along with the testimony of William was the foundation for the conspiracy count.

On the next day, William was called to the witness stand by the defense. He was asked a series of questions by the defense designed to elicit the hoped for testimony. However, William did not give the desired answers, but instead testified that he had no knowledge of any alleged telephone call with Alfred in November, 1981.

Following William's testimony, the Government informed the Petitioner that it had made, and was prepared to offer as evidence, its tape recording of the January 20, 1983 meeting. At that point, the Petitioner decided to change his plea from "not guilty" to "guilty". Judge James Watson of the International Court of Trade sitting

specially in the District of Rhode Island accepted the guilty plea on January 27, 1983. The appellant received a ten year sentence as a result of that plea.

Subsequently, on May 12, 1983, a federal grand jury filed a one-count indictment against the Petitioner. Count I charged the appellant, Mr. Cicilline and co-defendant, Alfred Scivola with conspiracy to suborn perjury, Indictment #83-037.

Co-defendants, John F. Cicilline and Alfred Scivola were severed and tried first on Indictment #83-037 in December, 1983. The case ended in a mistrial when the chief government witness recanted the most crucial testimony.

Subsequently the appellant was tried in March, 1984 on Indictment 83-037. The first trial of the Petitioner ended in a mistrial due to a deadlocked jury. Mr. Cicilline and Mr. Scivola were tried separately from the Petitioner in September, 1984. At the second Cicilline and Scivola trial, Scivola was acquitted of the conspiracy count, and convicted of the substantive perjury count.

Mr. Cicilline's second trial ended in a mistrial due to a deadlocked jury.

In December of 1984, a fourth trial of the instant indictment was scheduled to begin.

Just prior to this trial, defense attorneys made a substantial discovery relating to serious Constitutional errors in the grand jury process. The errors involved the April, 1982, October, 1982, and April, 1983 Grand Juries. The October 1982 Grand Jury had indicted this Petitioner. The defendants promptly filed motion to dismiss the in-

dictment based upon the Constitutional and statutory grounds.

The District Judge granted the Petitioner's motion to review the grand jury selection process. After an extensive and extended investigation of three weeks, the Petitioner learned that there appeared to be substantial violations of the Constitution, the Jury Selection Act (28 U.S.C., Sec. 1861 *et seq.*), and the Local Jury Selection Plan.

In sum, the above mentioned violations occurred when the Clerk's Office committed errors in their computerized selection process. As a result of these errors, the following contingency arose:

The grand jury which indicted this Petitioner was in essence composed of persons whose surnames began with the letters H through Z, and who lived in towns, the name of which began with the letters A through Paw. Obviously, this omission completely excluded a very significant amount of the population of this district;

1) Any individual whose surname began with the letters McE-Z, and lived in Pawtucket;

2) All individuals from Portsmouth, Providence, Richmond, Scituate, Smithfield, South Kingstown, Tiverton, Warren, Warwick, Westerly, West Greenwich, West Warwick, and Woonsocket. This is a total of thirteen and one-half cities and towns, out of a possible thirty nine cities and towns within the District. Statistically, the above list includes 461,978 citizens or fully 49% of the population of the District. Further, this list included the largest city (Providence, the situs of the District Court), the second largest city (Warwick), one-half of the fourth largest city (Paw-

tucket), and the sixth largest city (Woonsocket), in the district.

3) Any individual with a surname beginning with the letters A to H.

By the Clerk-Magistrate's own admission, the prior grand jury, and a subsequent grand jury, were chosen in the exact same fashion.

The selection process severely violated the Petitioner's right to a properly and fairly constituted grand jury.[1]

This exclusion was systematic and unwarranted.

A four-day hearing on the above motion was held during January and February, 1985. These hearings encompassed twenty-nine full exhibits, and eleven witnesses including the Clerk-Magistrate, part of his staff, and almost all of the attorneys, defense and prosecution. At the end of the hearing, the District Judge set a briefing schedule for what he called a substantial legal question.

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1. Indeed, as of the 1980 U.S. Census Tract, there were 16,978 persons of Afro-American Ancestry in the State of Rhode Island. The Clerk systematically and without reason excluded 13,343 Afro-American citizens by omitting 13.5 cities and towns. With one stroke, 78% of the Black population of the District was excluded from consideration as possible veniremen. In addition, the district claims 10,558 Hispanic residents. The Clerk systematically excluded 7,301 citizens of Hispanic origin or 70%. Thus, roughly 75% of the District's total minority population had no opportunity to serve on this venire.

Additionally, the Clerk omitted 49% of the Italian population of the district.

Of the approximately 118,000 voting Italians in the District, 57,461 were located in the omitted 13.5 cities and towns. Therefore, fully one-half of the eligible Italian population of the State was excluded from consideration on this grand jury panel.

As the Court was awaiting briefs from the parties, the Government convened the April, 1984 Grand Jury and sought superceding indictments against Mr. Cicilline and the Petitioner. The second indictment, (CR #85-015) was returned on February 20, 1985. There was *no new evidence* alleged as a basis for Indictment #85-015.

Indictment #85-015 differs from the original indictment in that it included an additional count of "obstructing justice" in violation of 18 U.S.C., Sec. 1503. Under the superceding indictment, the Petitioner was confronted with a maximum penalty of ten years, and fines totalling $15,000. Under the previous indictment, the Petitioner faced $10,000 in fines and a five year sentence. In effect, the Government "upped the ante" by five years and $5,000 in fines.

In September of 1985, the Petitioner went to trial and was acquitted of the conspiracy count, and was found guilty of the substantive count.

The Petitioner appealed the decision to the United States Court of Appeals for the First Circuit.

His conviction was affirmed by that Court on August 14, 1987.

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ARGUMENT

DID THE COURT OF APPEALS ERR BY FAILING TO REVERSE THE DISTRICT COURT'S RULING ON THE PETITIONER'S MOTION TO DISMISS THE INDICTMENT BASED ON EVIDENCE OF PROSECUTORIAL VINDICTIVENESS WHICH LED TO A VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The Appeals Court erred in failing to reverse the District Courts' ruling denying the Petitioner's Motion to Dismiss the Indictment for violations of his rights under the Fifth Amendment of the United States Constitution.

The Petitioner challenged the Government's action in seeking this superceding indictment. It is clear that the Government was already well aware of *all* of the pertinent facts which formed the basis for Indictment #85-015. Additionally, the Government chose to try Indictment #83-037 a total of three times, and was unable to gain a guilty verdict on the conspiracy charge, (except, of course, for co-defendant Scivola's conviction on the substantive perjury count).

The Government maintained that the "new" obstruction of justice charge was unavailable to them at the time of the initial charging. It became abundantly clear at the hearing on the instant motion, that there were no active prohibitions which precluded the Government from charging this appellant with a violation of 18 U.S.C., Section 1503 from the outset of this case in 1983.

In fact, at the Petitioner's motion for new trial, defense counsel and the government entered into a stipulation whereby it was agreed regarding Indictment 83-037:

> "That at the grand jury proceeding in that case that when witnesses were brought before the grand jury who were targets or who may be the subject of the grand jury, they were advised by [the Strike Force Prosecutor], that the grand jury was investigating violations of 18 U.S.C., Sections 1503 and 1512 which were obstruction statutes."
>
> (T.Tr. Vol. V, p.1)

The above evidence demonstrated clearly that the Government was aware of, and had the opportunity to charge the Petitioner with subornation of perjury in violation of 18 U.S.C., Section 1503 from the very inception of this indictment.

On August 26 and 27, 1985, the Trial Court entertained the Petitioner's Motion to Dismiss for Prosecutorial Vindictiveness.

At that time, trial counsel pointed out that the "omibus clause" of 18 U.S.C., Section 1503 now states:

> Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or im-*

pede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (Emphasis Added)

During his argument, trial counsel pointed out:

> In October of 1982, the so-called Victim Witness Protection Act came into effect, which at that time in some ways refashioned and expanded upon the various obstruction of justice Statutes known as 18 United States Code 1503 and 1510 and 1512 particularly. Throughout the period that both before the October '82 amendment and after the so-called omnibus clause, which is the last sentence in 18 U.S.C. 1503, remained in full effect and intact, unchanged. The original prosecution of this case was brought pursuant to a conspiracy to suborn perjury charge . . .
>
> [I] do think that one of the reasons may well have been that the case was brought on a singular conspiracy as it related to Mr. Marrapese and Mr. Cicilline was for this reason: and that is that had the government brought a case, as has been brought now, including the substantive charges, the chances of convicting Mr. Cicilline would be even less. And I suggest to the Court, and I will continually suggest to this Court, that the government's prime motivation in the case was to convict John Cicilline. And had the government, originally the government went to trial on a case involving a singular conspiracy between Marrapese and Cicilline. There was no question, and I recall the Court's comments to me, and I can't help but remember them because there was no question about them, but the Court said to me at one time and jocularly, and I attribute no motivation of the Court, I'm anxious to see Marrapese's defense in the conspiracy case based on the tape because clearly the substantive conduct was there. But the government knew that if they tried Marrapese and Cicilline together, that the jury would see clearly the substantive conduct of Mr. Marrapese and fall to the argument

> that Cicilline did not conspire. It would give the jury something to convict Marrapese on, and it would give an out to Cicilline. And I looked at the case that way quite frankly from the beginning as did Counsel for Mr. Cicilline as we spoke about it. It's very hard for me to fathom that someone who has been categorized as one of the finest criminal lawyers in the United States Department of Justice system, that someone who has been categorized as one of the finest chiefs of field offices in the Department of Justice system, never bothered once, if this case was of import to them as they state, to read the congressional record, to read the administrative news, to read their own updates in the United States Attorney's Manual in March of 1984, to read and interpret what three other United States Attorney Offices did and brought cases upon.
>
> (Tr. Motion to Dismiss (M.D.), Vol. 2, pp.2-4)

The "omnibus" clause was the operative force under these facts and was unchanged during this period. The "omnibus" clause proscribed the Petitioner's behavior, and was available to the government before and after the change in statutory construction. See generally, *United States v. Mitchell*, 574 F.2d 758 (6th Cir. 1975), *In Re Carr*, 436 F.Supp. 493 (N.D. Ohio 1977). See also *62 ALR Fed. 303 et seq., 20 ALR Fed. 731, et seq.*

Moreover, the evidence adduced at the hearing demonstrated that the prosecutor never investigated whether any of the cases which discussed the so-called "omnibus" clause of 18 U.S.C., Section 1503, applied in the instant case. As related, the "omnibus" clause clearly allowed prosecutions for the activity attributed to the Petitioner. Thus, the prosecution for the substantive count was available to the Government from the outset of the case.

Defense counsel also presented substantial evidence which established an obvious appearance of vindictiveness

and, in fact, an outright animus between the prosecutor and the Petitioner.

During a chambers plea conference in Cr. #82-049, between the then defense counsel, Mr. Cicilline, the former prosecutor, and Judge Watson, the prosecutor produced a derogatory cartoon from the "Gunsmoke Gazette". (Transcript Motion to Dismiss (M.D.), Vol. I, pp.84-85; Vol. 2, p.6). The purpose behind this proffer to the defense was to villify the petitioner. The purpose was to deal with another man's life in such a way as to evidence a dislike or personal distaste. This distaste was carried over to the instance when the same prosecutor walked into the holding block at the United States Marshall's Service and attempted to enlist the Petitioner's cooperation against Mr. Cicilline. On that occasion, several obscenities were elicted from the Petitioner in response. (T.R. M.D. Vol. 2, p.7).

Indeed, during the pendency of this case, the prosecutor was charged with prosecutorial misconduct on three separate occasions. Each respective motion had to be termed as serious and hard fought.

In December of 1983, the original case against Mr. Cicilline and Mr. Scivola ended in a mistrial. The District Judge denied the defendants' motions to bar retrials, but commented upon the state of the prosecution. As defense counsel in the instant case stated:

> "[I] believe the Court did say that although you did not find him to be, to rise to the height of prosecutorial misconduct, you did believe or you did find that the prosecution failed to properly prepare their case, at least in what you may consider to be the proper manner for United States Attorneys"
>
> (Tr. M.D. Vol. 2, p.7)

After the 1983 mistrial, and following appellate review, the Petitioner went to trial alone in March, 1984. In that particular trial, the government came into the case, and tried it on the conspiracy theory. However, the case ended with a deadlocked jury. (Tr. M.D. Vol. 2, p.8)

Subsequently, there was various posturing regarding a motion to dismiss based upon prosecutorial misconduct involving intense pre-trial publicity. The sum and substance of that hearing was whether or not the said prosecutor had improperly given information to the press which would have caused the publicity. Although the Trial Court denied the motion, he issued a stern rebuke to the Government. (Tr. M.D. Vol. 2, p.8)

Obviously, the above attacks by the defense against this prosecutor had to bring about a semblance of at best, frustration, and at worst, animosity toward the defense.

Undoubtedly, the Government had to consider this motion to dismiss the Indictment as a major annoyance or hinderance to their office. There was testimony from Mr. Marvin R. Lowey, a top official of the United States Department of Justice, (Tr. M.D. Vol. 1, pp.62-64), Jeremiah O'Sullivan, United States Department of Justice, Chief, Boston Strike Force, (Tr. M.D. Vol. 1, pp.139-142), Edwin J. Gale (Deposition of Edwin J. Gale, July 25, 1985, Re: CR #85-015 at Providence, R. I., pp.36-38), and Lincoln C. Almond, United States Attorney for the District of Rhode Island (Tr. M.D. Vol. 1, pp. 105-106), that once the Motion to Dismiss for Violations of Grand Jury Selection was made by these defendants, the Government faced several problems.

First of all, "win, lose, or draw", three and possibly four grand juries were infected with the same constitu-

tional infirmities. As a result, numerous other Indictments were jeopardized if the Trial Court were to agree with the Petitioner's contentions. If the Trial Court were to deny the motion to dismiss, then the Government would have had to wait until the Court of Appeals, or this Honorable Court made a determination of their respective legality. All of the above Indictments could have then been subjected to dismissal at their respective appropriate times.

Obviously, the fact that this Petitioner and his co-defendant attacked the Grand Jury selection process and threatened havoc with the government's caseload, had to leave a "bad taste" with the Department of Justice.

Any threat of retaliation by the Government in the instant matter must not have been seen as unreasonable by prudent defense counsel. Here, the threat of retaliation was not merely imagined. Two of the defense counsel testified as to conversations they had with the prosecution regarding the pending Grand Jury challenge, and the resultant possibility of a superceding indictment. Under direct examination, Mr. John Sheehan (counsel for Mr. Cicilline) stated:

> . . . [By Mr. Egbert]
>
> Q. I want to direct your attention, Mr. Sheehan, to a time when there was some discussion concerning the return of a superceding indictment in this case and ask you whether or not you recall having such a conversation with members of the prosecution team?
>
> A. I believe I had the conversation with both Mr. Gale and Mr. Almond, but I'm not that sure about Mr. Almond, but I understand he said I did so, I think I did.
>
> Q. You don't dispute the fact that you did if he so testified?
>
> A. No, I do not.

Q. And to you have a memory as to when and where you had those conversations?

A. It would be in this Courthouse, not necessarily the Courtroom but the Courthouse, and it was during the time of the challenging of the Grand Jury.

Q. And first with Mr. Gale, you seem to have a memory of a conversation with Mr. Gale?

A. I believe I had a conversation either in this Courtroom myself during a recess or outside the Courtroom, and I suspect that it was at a time when Mr. Cicilline wasn't here because I related the conversation to Mr. Cicilline I recall that afternoon. Which afternoon I don't know obviously.

Q. Would you tell us please what that conversation was?

A. With Mr. Gale?

Q. Yes.

A. There was some general conversation about the challenge to the Grand Jury. There was a general conversation about its creating a lot of problems for everybody and where are we really going with it, that he would bring a superceding indictment if necessary and it could have additional charges. And I remember specifically calling Mr. Cicilline on that, that last point, the additional charges.

Q. You made a point of relaying that to Mr. Cicilline?

A. Yes.

(Tr. M.D. pp.124-125)

Furthermore, on direct examination, Mr. Richard Egbert, counsel for the Petitioner stated:

Q. I want to direct your attention to a conversation that you had with Mr. Gale, the prosecutor, the previous prosecutor in this matter, concerning the issue that this hearing has been about, did you have a conversation with Mr. Gale at some time?

A. Yes, I did.

Q. And can you tell us when it was?

A. It was in the hallway during the course of one of the evidentiary hearings on the motion to dismiss for Grand Jury irregularities during the motions which were filed in the previous indictment. So it would have been either in December of 1984 or January of 1985.

Q. Would you tell the Court what that conversation was?

A. Mr. Gale came up to me and we were talking about the proceedings basically that were going on. Mr. Gale said to me, and I quote it, but substantially "Why are you proceeding with this motion, I can always reindict if you win." And I said to him that I thought it was important that Mr. Marrapese's rights to a fair Grand Jury be carried forward. And he indicated to me, well, if you persist in this motion, all right, I just may reindict him and add some substantive charges. That was the extent of the conversation.

(Tr. M.D. pp.86-87)

It is obvious that these experienced trial attorneys had no doubt about the Government's intentions. There is no question but that there was a reasonable likelihood of vindictiveness. See *United States v. Andrews,* 633 F.2d 449 (6th Cir. 1980) where the Court stated:

> "If the standard to be applied was proof of actual vindictiveness, a trial Judge would have the Hobson's choice of either not barring the extra charge or of saying that a prosecutor acted wrongly. In some cases, a trial Judge would effect by calling a prosecutor a liar where the prosecutor claimed inadvertence, and the Judge ruled against him. We do not think that such confrontations before the judiciary and executive branch are desirable. The standard of *realistic likelihood of vindictiveness* allows the filing of charges in appropriate situations without the need to find that the Prosecutor acted in bad faith." *Id.* at p. 452. See

also *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), *North Carolina v. Pearce*, 395 U.S. 711 (1969).

The following impression had to be inscribed in the minds of the defense counsel, and the defendants. If you challenge the government too much, if you cause too many problems, if you exercise too many rights, or if you try these cases too hard, "you" will be made to pay for it dearly. The appellant submits that is the type of appearance which leads directly to violations of the Fifth Amendment. Such reprehensible tactics on behalf of the executive branch caused great prejudice to the appellant.

The Court of Appeals decision regarding the proof of actual vindictiveness is clearly erroneous. It is often difficult to demonstrate concrete evidence of actual vindictiveness. As related, the petitioner has pointed to numerous manifestations of actual vindictiveness. However, the Court of Appeals cast these allegations aside. The Court stated:

> "*A. Evidence of Actual Vindictiveness*
>
> Marrapese points to the following evidence of vindictiveness: (1) the prosecutor made jocular, derogatory comments about Marrapese in a chambers conference; (2) Marrapese and the prosecutor had an altercation when the prosecutor asked him to cooperate in the case against his lawyer; (3) the prosecutor questioned the wisdom of Marrapese's attack on the grand jury process, commenting that he could always issue a superseding indictment, with additional counts if necessary; and (4) the aggressive defense throughout the companion conspiracy cases aggravated the prosecutor.
>
> The first two events were well removed in time from the superseding indictment, and not strong evidence in any case. The third event, the prosecutor's comments to defense counsel, appears at first glance

> to be more troubling. But a careful analysis of the allegations and the context in which they arose, provides adequate support for the district court's conclusion that defense counsel overreacted, reading a sinister motive into innocuous remarks. Finally, although the defendants in these cases pursued their defense very aggressively, Marrapese can point to no evidence, other than that just recited, that the prosecutor behaved in anything other than a professional manner, or that he was any more aggravated by the defense tactics than prosecutors are generally. A criminal trial is not a tea party''. (Court of Appeals Decision, App. pp. 5-6).

The Court of Appeals went on to state that they agreed with the District Court's assessment as to the prosecutor's reason for adding the extra charge. The prosecutor alleged an amendment in the statute, 18 U.S.C., Sec. 1503 in October 1982, as reason for not originally charging the Petitioner with the added offense. See Court of Appeals Opinion, App. at p. 9).

However, the Petitioner demonstrated that the omnibus clause was unchanged and clearly covered this conduct throughout this period.[2] The prosecution did not add the new charge until they had three trials of the conspiracy count and could not convict any of the co-defendants on that particular charge. Again, the prosecution did not add the extra charge until after the Petitioner had mounted a serious challenge to the grand jury selection process.

Therefore, the Petitioner avers that the Court of Appeals erred by not acknowledging the manifestation of actual vindictiveness presented in this petition.

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2. The United States Attorney's Manual also reflected that the omnibus clause was unchanged, and thus applicable.

As a result of the petitioner's motion and subsequent hearing, the government made much of the fact that *United States v. Goodwin,* 457 U.S. 357 (1982) should be applicable to the instant case.

Basically, in *United States v. Goodwin, supra,* this Honorable Court considered the scope of *Pearce* and *Blackledge* which establish a presumption of vindictiveness when additional charges are brought or increased punishment occurs at retrial. In *Goodwin,* the prosecutor added felony charges after the defendant, who was originally charged with misdemeanors, insisted on a jury trial. There, the Fourth Circuit reversed and applied a presumption of prosecutorial vindictiveness which the prosecutor had failed to rebut. This Honorable Court reversed and ruled that the *Pearce-Blackledge* presumption of prosecutorial vindictiveness did not apply in the pretrial setting. Rather, Goodwin's situation was analogized to that of the defendant in *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (Where the Court approved a prosecutor's threat to add charges if the plea offer was not accepted.) If the defendant can show a realistic likelihood of prosecutorial vindictiveness, the burden is on the government to answer or explain the allegations. The Court must consider a variety of factors in determining whether due process claim has been substantiated. *See United States v. Schiller,* 424 A.2d 51, 56 (D.C. 1980).

As related, the instant case presents a unique and convoluted fact pattern that has been discussed at length. This case had been to trial in one form or another on three separate occasions. It has been tried to its conclusion twice resulting in deadlocked juries on the conspiracy count. The other incarnation of this case ended in a mistrial. None of the three original defendants were ever

convicted of the conspiracy count in Indictment # 83-037, or Indictment # 85-015. At least one of the co-defendants (Scivola) was convicted of the substantive perjury count, so the case was concluded fully in one sense.

The Government did not "up the ante" after the first mistrial, nor did they do so after the second mistrial. The Government did not immediately add the extra charge after the third mistrial. *The Government took this action only after the defendants exercised their constitutional and statutory right to challenge the indictment.*

In addition, *consideration must be given to the fact that the prosecution was unable to gain a conviction on the consipracy count. Consideration must also be given to the aforementioned threatening and cynical remarks and actions of the lead prosecutor.*

Finally and perhaps most significant, the government *added an extra charge to this indictment without one shred of new or different evidence, and by formulating the new charge, the Government improved its position immensely regarding the strength of its case.*

Thus, the instant case is easily distinguishable from *United States v. Ruppel,* 724 F.2d 507 (5th Cir. 1984), (where the defendant took no action following a mistrial on the heels of a hung jury), Cf., *United States v. Kahn,* 787 F.2d 28 (2nd Cir. 1986).

The Court of Appeals clearly erred by refusing to acknowledge a presumption of vindictiveness in the instant case. The Court of Appeals stated:

> "Marrapese points to two circumstances in this case that warrant a presumption of vindictive persecution. First, he was indicted for obstruction of justice only after his trial on the conspiracy charged ended in

> a mistrial. And second, the obstruction of justice indictment followed Marrapese's challenge to the grand jury that issued the original conspiracy indictment. Marrapese argues that in these circumstances, the filing of the additional charge was likely intended to punish him for vigorously asserting his procedural rights.
>
> We do not find this assertion as compelling as Marrapese would like."
>
> (Court of Appeals Opinion, App. at p. 6).

The Petitioner, again avers that a presumption of vindictiveness was clearly present in the instant case.

The Court of Appeals improperly ruled:

> "In this case, the prosecutor had very little incentive to discourage Marrapese from challenging the grand jury proceeding. Unlike the assertion of a right to a de novo trial, a challenge to the composition of a grand jury poses only a minor threat to scarce prosecutorial resources."

There is no doubt that the Court of Appeals improperly minimized the significance of the petitioners grand jury challenge. The Court of Appeals seemed to focus upon the grand jury challenge as only a routine pretrial motion. That particular pronouncement by the Circuit Court was short-sighted.

The challenge to the grand jury selection process of the instant petitioner was extremely consequential. As related, it involved a four day hearing with witnesses summoned from Washington, D.C., Boston, and Rhode Island. In and of itself, the hearing on the said motion greatly taxed the staff of the District Court Clerk's Office, and greatly inconvenienced some of the highest officials of the United States Department of Justice. The evidence at the hearing showed that at least three, and perhaps four grand

juries were putitively selected in an unconstitutional manner.

If a ruling adverse to the government were tendered by the District Court, the government would have been faced with numerous challenges to indictments issued by the infected grand juries. It is not difficult to perceive that such a *contingency would have been a significant strain on scarce prosecutorial resources. Bordenkircher v. Hayes, supra.*

The facts and circumstances of this case clearly call for an analysis under *Pearce-Blackledge* and the cases following within this petition.

Indeed, in *Thigpen v. Roberts,* 468 U.S. 27 (1984) this Honorable Court reaffirmed its holding in *Blackledge.* In *Thigpen,* the defendant had been convicted of four misdemeanors and then requested a trial *de novo* which was permitted under Mississippi law. His subsequent indictment and conviction for manslaughter *arising out of the same factual situation* in his trial *de novo* was found to be a violation of the due process clause. The Court stated:

> "At oral argument, the State suggested that *Blackledge* had been overruled, or at least modified, by *United States v. Goodwin, supra . . . Goodwin* held that the *Blackledge* presumption does not apply when charges are enhanced following a pre-trial demand for a jury trial. We distinguished *Blackledge* on the *basis of the critical differences in the timing of the heightened charge and in the amount of extra effort to which the defendant has put the state."* (Emphasis Added) 468 U.S. n.4 at p.30.

In the instant case, *the timing of the heightened charges, and the efforts of the Government in prosecuting this case three times, defending misconduct motions three*

times, and being faced with the putative dismissal of this and perhaps several other indictments, leads to the absolute conclusion that the prosecution was vindictive in nature.

Indeed, many courts have resolutely proscribed the reprehensible tactics utilized in this case. For instance, in *Lovett v. Butterworth,* 610 F.2d 1002 (1st Cir. 1979), the defendant was charged with breaking and entering in the nighttime a dwelling house . . . with intent to commit a felony. This particular crime could have been tried in the District Court of the Commonwealth as well as the Superior Court of the Commonwealth. After a District Court conviction, the defendant appealed. While the appeal was pending, the Commonwealth obtained a grand jury indictment on the *identical facts* charging the Petitioner with the crime of breaking and entering in the nighttime, a dwelling house with intent to commit a felony. This charge was more serious and carried a larger penalty. The First Circuit rejected that ploy and stated:

> "The fact that the petitioner here technically may not have been indicted on a 'more serious charge' is of little constitutional significance since due process principles apply to enhanced sentences as well as enhanced charges. *United States v. Mayllah,* 503 F.2d 971, 987 (2d Cir. 1974). 'Due Process not only describes vindictive indictments, it also protects against vindictive prosecutions.' *Miracle v. Estelle,* 592 F.2d 1269, 1274 (5th Cir. 1979). It is the prosecutor's attempt 'to retry the appellant, seeking a heavier penalty for the same acts as originally charged, [that] is inherently suspect . . . .' *United States v. Preciado-Gomez,* 519 F.2d 935, 939 (9th Cir. 1976). Since *Pearce* requires us to review harsher sentences resulting from the decisions of sentencing judges, it follows that we must review harsher sentences resulting from the actions of the prosecutor, the defendant's natural adversary whose

job it is to obtain convictions. This is especially so since policies favoring judicial discretion and flexibility in sentencing, see *Colten v. Kentucky,* 407 U.S. 104, 112-19, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), do not apply to the prosecutor. 'There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individuaul and institutional abuse. And broad though that discretion may be, there are undoubtedly costitutional limits upon its exercise.' *Bordenkircher v. Hayes,* 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978). Where, as 'in the situation here the central figure is not the judge or jury, but the prosecutor . . . due process of law requires a rule analogous to that of the *Pearce* case.' *Blackledge v. Perry,* 417 U.S. at 27. See also *Marano v. United States,* 374 F.2d 583 (1st Cir. 1967). See also *United States v. DeMarco,* 550 F.2d 1224 (9th Cir. 1977), *Koski v. Samaha,* 491 F.Supp. 432 (D.N.H. 1980)."

Indeed, in *Lovett v. Butterworth, supra,* the case involved a second indictment arising out of the same factual nucleus as the first indictment. The Court observed:

> *"Petitioner should not now be penalized for any error of the Commonwealth in its fashioning of the original charge. "[I]t is the apprehension that there may be retaliatory action, not the procedural state of facts, which implicates due process rights . . . That the government failed to [bring the grand jury indictment] prior to the defendant['s] assertion of the right to [trial de novo] because of . . . [a] mistake . . . does not alter the fact that the increased charge 'appears vindictive . . .'*
>
> *That the prosecutorial error was inadvertent is of course, no acceptable excuse whatsoever. United States v. Ruesga-Martinez,* 534 F.2d 1367 (9th Cir. 1976)." (Emphasis Added)

In *United States v. Hollywood Motor Car Co.,* 646 F.2d 384, 386 (9th Cir. 1981), reversed on other grounds,

458 U.S. 263 (1982), citing *United States v. DeMarco, supra,* the Court stated:

> "[D]ue process rights are violated where the Government threatens to increase the severity of the charges against . . . [a defendant] to discourage . . . [the] exercise of his venue rights." *Id.* p. 386.

The Court went on to state:

> "*. . . The trial was moved and shortly thereafter the Government obtained a second indictment in California which added a new charge based upon essentially the same facts as the initial indictment. The Court held that a claim of vindictive prosecution had been established and ordered the indictment dismissed.* The Court held that 'it was not constitutionally permissible for the Government to threaten to "up the ante" to discourage DeMarco from exercising his venue right; a fortiori it was constitutionally impermissible to follow up that threat with the California indictment.' *DeMarco, supra,* at 1227-8." *Id.* p. 387. (Emphasis added).

Thus, from a reading of the *Lovett* and *DeMarco* decisions, it is clear that the Courts take a dim view of enhanced charges and penalties arising from the same factual nucleus. Here, the Government had alleged no factual basis beyond what was already before three juries, the Court, and the Grand Jury. Again, the new indictment was merely a rehash of the first indictment. The prosecution had attempted to create a smokescreen to legitimize its bastardized indictment, by alleging "new" charges. The government failed miserably.

The United States District Court, for the District of Rhode Island has dealt squarely with this issue in *United States v. D'Alo,* 486 F.Supp. 954 (D.C. R.I. 1980). In that case, the Court was faced with a case where the Government had originally charged the defendants with manufacturing counterfeit slugs (18 U.S.C., Sec. 491(b)), and a conspiracy to commit the same offense (18 U.S.C.,

Sec. 371). After the filing of pre-trial motions, and the commencement of a trial, the trial was aborted by the Court in granting the defendant's motion for a mistrial. The Government then dismissed the first indictment and filed a superceding information charging the defendant in two counts with selling and one count of conspiring to "manufacture, sell, offer for sale, and keep with intent to sell."

The Court observed:

> "Undoubtedly, the government profited by the Court's comments at the conference and by the mistrial itself. The prosecution obviously realized it would have difficulty proving a violation of 18 U.S.C. S.491(b) bottomed on the manufacturing of slugs; and so, instead of seeking a retrial on the original indictment, it dismissed the same and filed the present information postulated on the selling prohibitions of the Code."

The judge then went on to apply *Blackledge v. Perry, supra* and *North Carolina v. Pearce, supra,* to the facts of his case.

> "Because it (the Court in *Blackledge v. Perry*) found that "a person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the State will retaliate by substituing a more serious charge for the original one." id. at 28, 94 S.Ct. at 2102, the Court found the bringing of the more serious charge unconstitutional. Significantly, the Court found no evidence that the prosecutor acted in bad faith or with malice in seeking the felony indictment.
>
> Although the Supreme Court has not addressed a case involving the issue of a mistrial, I see no reason why the prosecutor should not be bound by the *Pearce and Blackledge* constraints. The very same concern evident in the Supreme Court cases—that a defendant will hesitate to pursue a statutory or constitutional right for fear of prosecutorial retaliation

—exists in this case; the defendant is in effect being penalized for moving for a mistrial. A similar conclusion was reached by the District of Columbia Circuit in *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974)."

After reviewing the *Jamison* case, and countering the Government's arguments, the Court made a poignant and forceful ruling. He stated:

> "I cannot agree with the government's arguments. *Blackledge* did not hinge on the fact that the charge was upped from a misdemeanor to a felony; neither did *Jamison* hinge on the fact that the degree of the crime was increased. *Rather, the crux of the issue in both cases was that the defendant was penalized for exercising his rights. Although it may be true in the instant case that the degree of the crime charged has not increased and that the likelihood of a more severe sentence is remote, the fact is that the government has improved its potential for conviction by reformulating the charges against D'Alo. To victimize a defendant significantly for having successfully pursued a legitimate trial tactic runs afoul of the constitutional guarantee of due process, which requires that a defendant not labor under the apprehension of retaliatory measures. The new information, unquestionably prompted by the evidence developed at trial prior to the declaration of mistrial, increases the potential for conviction. This kind of penalty cannot be imposed upon the defendant's exercise of his constitutional right to a fair trial."* (Emphasis added). *id.* at p. 960.

There can be no doubt that the Courts' ruling should have been applied in the instant case to dismiss the indictment. The Government had clearly used information garnered by the trial to improve their position. They had knowledge of the defendant's trial tactics and strategies. As related, after three trials, the Government could not secure a conviction on the conspiracy count of Indictment #83-037. The Government was aware of the weaknesses

of its own case after observing its main witness William Smith testify before a jury three times.

In the instant case, the degree of the crime charged increased the likelihood of a more severe sentence significantly. The Government had improved its chances at conviction (at least regarding this Defendant) by reformulating the charges. There can be no doubt that this Defendant has been victimized for having pursued a legitimate trial tactic.

The Government's inadvertent or willful failure to charge this appellant under 18 U.S.C., Section 1503 at the outset of this case is obviously not an acceptable excuse. *United States v. Ruesga-Martinez, supra.*

Thus, for all of the above reasons, the District Court abused its discretion, and concomitantly the Court of Appeals committed reversible, prejudicial error by denying the Petitioner's Motion to Dismiss the superceding indictment.

CONCLUSION

Petitioner requests that this Petition be granted.

Respectfully submitted,

RICHARD M. EGBERT, ESQ.
(Counsel of Record)
260 Franklin Street
Boston, Mass. 02110
(617) 439-6020

EDWARD J. ROMANO, ESQ.
165 Atwells Avenue
Providence, R. I. 02903
(401) 273-5600

Attorneys for Petitioner
Frank L. Marrapese

September, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 86-1045

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

FRANK L. MARRAPESE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Coffin and Torruella, *Circuit Judges*.

Edward J. Romano, by appointment of the Court, for appellant.

Maury S. Epner, Attorney, Department of Justice, with whom *Lincoln Almond*, United States Attorney, and *John Voorhees*, Special Attorney, Department of Justice, were on brief for appellee.

August 14, 1987

TORRUELLA, *Circuit Judge.* Frank L. Marrapese appeals from his conviction of obstruction of justice under 18 U.S.C. § 1503 and from his sentencing as a dangerous special offender under 18 U.S.C. § 3575.

Marrapese was originally indicted in May 1982 for his involvement in a stolen goods conspiracy. While that case was proceeding, Marrapese contacted a witness and tried to induce him to change his testimony. The witness contacted the government and was outfitted with a body tape recorder to wear to a meeting with Marrapese at Marrapese's lawyer's office. The tape recorded Marrapese requesting the witness to tell "three lies." As soon as the tape was played in the stolen goods trial, Marrapese changed his plea and was sentenced to ten years imprisonment.

The government subsequently charged Marrapese, his lawyer, and a third person on May 12, 1983, with conspiring to suborn perjury. Marrapese's trial, which was severed from the other two defendants, resulted in a deadlocked jury and a mistrial in March 1984.

The court scheduled a retrial for December 3, 1984, but Marrapese challenged the grand jury that had produced the conspiracy indictment. The government then convened a second grand jury in February, 1985, which issued a superseding indictment charging Marrapese with conspiracy to suborn perjury *and,* for the first time, obstruction of justice. At the retrial Marrapese was acquitted of the conspiracy count and convicted of obstruction of justice. The district court sentenced him to fifteen years under the dangerous special offender statute, 18 U.S.C. § 1503.

On appeal Marrapese alleges three errors. First, he argues the obstruction of justice count should have been dismissed as a product of vindictive prosecution. Second, he argues that a statement in the prosecutor's closing argument was prejudicial error. And third, he argues that the application of the dangerous special offender statute violated his right to due process and constituted cruel and unusual punishment.

I. *Vindictive Prosecution*

There are two ways a defendant may show vindictive prosecution. First, a defendant may produce evidence of *actual* vindictiveness sufficient to show a due process violation. *See United States v. Goodwin*, 457 U.S. 368, 380 n.12 (1982). Alternatively, a defendant may convince a court that the circumstances show there is sufficient "likelihood of vindictiveness" to warrant a presumption of vindictiveness. *See Goodwin, id.* at 376; *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). If so, the prosecutor bears the burden of rebutting that presumption by showing objective reasons for the additional charge that were not present when the original charge was brought. *Goodwin*, 457 U.S. at 376 n.8.

A. Evidence of Actual Vindictiveness

Marrapese points to the following evidence of vindictiveness: (1) the prosecutor made jocular, derogatory comments about Marrapese in a chambers conference; (2) Marrapese and the prosecutor had an altercation when the prosecutor asked him to cooperate in the case against his lawyer; (3) the prosecutor questioned the wisdom of Marrapese's attack on the grand jury process, commenting

that he could always issue a superseding indictment, with additional counts if necessary; and (4) the aggressive defense throughout the companion conspiracy cases aggravated the prosecutor.

The first two events were well removed in time from the superseding indictment and not strong evidence in any case. The third event, the prosecutor's comments to defense counsel, appears at first glance to be more troubling. But a careful analysis of the allegations and the context in which they arose provides adequate support for the district court's conclusion that defense counsel overreacted, reading a sinister motive into innocuous remarks. Finally, although the defendants in these cases pursued their defense very aggressively, Marrapese can point to no evidence, other than that just recited, that the prosecutor behaved in anything other than a professional manner, or that he was any more aggravated by the defense tactics than prosecutors are generally. A criminal trial is not a tea party.

Additionally, the district court found the prosecutor's explanation of the reason for the addition of the obstruction of justice count credible. In October 1982, seven months before Marrapese was originally indicted in this case, Congress enacted the Victim and Witness Protection Act, 18 U.S.C. § 1512, which prohibits, *inter alia*, the use of violence or coercion to influence the testimony of a witness. The Act also amended 18 U.S.C. § 1503 by eliminating its reference to influencing, intimidating, or impeding witnesses. The prosecutor understood the Act and the amendment to mean that § 1503 no longer prohibited noncoercive efforts to influence witnesses. The reasonableness of this understanding was demonstrated in March, 1984, when the

Second Circuit stated, in dictum, that "Congress intended to remove witnesses entirely from the scope of § 1503." *United States v. Hernandez,* 730 F.2d 895, 898 (2d Cir. 1984).

Subsequent court decisions, however, questioned this reading of § 1503. These later decisions focused on the omnibus clause of § 1503, which was not changed by the October, 1982 amendments, and which prohibits all "endeavors to influence, obstruct, or impede[] the due administration of justice." Non-coercive tampering with witnesses, these courts concluded, *is* covered by this omnibus clause. *See United States v. Lester,* 749 F.2d 1288 (9th Cir. 1984); *United States v. Beaty,* 587 F. Supp. 1325 (E.D.N.Y. 1984); *see also United States v. Risken,* 788 F.2d 1361 (8th Cir.), *cert. deined,* 107 S. Ct. 329 (1986); *United States v. Rovetuso,* 768 F.2d 809 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1951 (1986); *United States v. Wesley,* 748 F.2d 962 (5th Cir. 1984), *cert. denied,* 471 U.S. 1130 (1985). The prosecutor in this case learned of the *Lester* decision in December, 1984, and immediately recommended to his supervisor that Marrapese be charged with obstruction of justice for his noncoercive witness tampering. Based on this evidence, and on the prosecutor's testimony that it was easier to issue a new indictment than to defend the old one against Marrapese's challenge, the district court found that there was no credible evidence linking the superseding indictment with any vindictiveness by the prosecutor. That finding was not clearly erroneous.

B. Likelihood of Vindictiveness in the Circumstances

Marrapese points to two circumstances in this case that warrant presumption of vindictive prosecution. First,

he was indicted for obstruction of justice only after his trial on the conspiracy charge ended in a mistrial. And second, the obstruction of justice indictment followed Marrapese's challenge to the grand jury that issued the original conspiracy indictment. Marrapese argues that in these circumstances the filing of the additional charge was likely intended to punish him for vigorously asserting his procedural rights.

We do not find this assertion as compelling as Marrapese would like. Marrapese's superseding indictment, filed after the mistrial and the challenge to the grand jury, does not present the same "likelihood of vindictiveness" that the Supreme Court found in the only cases which warranted the presumption Marrapese seeks here. *See United States v. Khan,* 787 F.2d 28, 32-33 (2d Cir. 1986) (no presumption of vindictiveness when additional charges added after a mistrial due to a hung jury).

In *North Carolina v. Pearce,* 395 U.S. 711 (1969), the appellant received a longer sentence after a retrial than he had received after his first, constitutionally flawed, trial. Due to the likelihood that the higher sentence was an attempt to punish appellant for asserting his right to appeal, the Court held that a judge could not impose an enhanced sentence on retrial unless he specifically identified in the record his reasons for doing so. Those reasons, moreover, must be "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. In effect, the *Pearce* Court applied a presumption of vindictiveness to the judge's action, a presumption rebuttable only by objective information in the record. *Goodwin,* 368 U.S. at 374.

The only other two cases in which the Court applied a presumption of vindictiveness also involved retrials after a trial and conviction. Both *Blackledge v. Perry*, 417 U.S. 21, and *Thigpen v. Roberts*, 468 U.S. 27 (1984), were habeas actions brought by defendants who, after they asserted their statutory right to trial de novo following misdemeanor convictions, were charged with felonies arising out of the same facts that led to the misdemeanors. As in *Pearce*, the effective price of exercising their rights was the risk of greater punishment. The Court explained:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Blackledge, 417 U.S. at 27-28. The focus, then, in evaluating the likelihood of vindictiveness is not only on the right of the defendant, but also on the incentive of the prosecutor to prevent the defendant from asserting that right.

In this case the prosecutor had very little incentive to discourage Marrapese from challenging the grand jury proceeding. Unlike the assertion of a right to a de novo trial, a challenge to the composition of a grand jury poses only a minor threat to scarce prosecutorial resources. Thus,

there is less reason for a presumption of vindictiveness than in *Blackledge* or *Thigpen*. *See Goodwin*, 457 U.S. at 381 ("It is unrealistic to assume that a prosecutor's probable response to such [routine pretrial] motions is to seek to penalize and deter.").[1] And it is unlikely any retaliatory animus flowed from the first trial's ending in a mistrial; after all, the mistrial was due to a hung jury, not to any legal challenge by Marrapese. *Compare United States v. Khan*, 787 F.2d 28, 32-33 (2d Cir. 1986) (hung jury unlikely to inspire prosecutorial wrath) *with United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974) (defendant's motion for mistrial on ground of ineffective counsel may lead to vindictiveness).

Marrapese's situation presented less likelihood of vindictiveness than the additional charge filed against the defendant in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), who forced the prosecutor to go to trial by refusing to plead guilty. Here, the prosecutor had already prepared for trial and scheduled the retrial; Marrapese's actions were little more than an annoyance. In *Bordenkircher*, where the Supreme Court refused to apply a presumption, the defendant's refusal resulted in a serious drain on prosecutorial resources. *See also United States v. Goodwin*, 457 U.S. at 381-83 (no presumption of vindictiveness

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[1] This case is likewise distinguishable from *Lovett v. Butterworth*, 610 F.2d 1002 (1st Cir. 1979), where we found a due process violation in the Commonwealth's decision to re-indict defendant on a more serious offense after he had been convicted in district court and had subsequently exercised his right to seek a de novo trial in superior court. *Lovett*—like *Blackledge* and *Thigpen*—involved the assertion of a procedural right—an appeal—carrying different and graver consequences to the prosecution and to defendants generally than are implicated here.

when a defendant was indicted on felony charges after requesting a jury trial for a misdemeanor charge).

Were the presumption nevertheless to apply to this case, the prosecutor's explanation of the changed circumstances that led to the obstruction of justice charge would rebut any likelihood of vindictiveness. *See ante* at 4. The inconsistency of *Lester*, 749 F.2d 1288, with the prosecutor's original, reasonable understanding of § 1503 provides a sufficient, objective change of circumstances to dispel the concerns that would underlie a presumption of vindictiveness. *See Blackledge*, 417 U.S. at 29 n.7 ("[t]his would clearly be a different case if the state had shown that it was impossible to proceed on the more serious charge at the outset"); *Pearce*, 395 U.S. at 726 (requiring "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing" to justify an increased sentence after a retrial on the same charge). Although the rebuttal here does not fall neatly within the language of either of these pronouncements, we think it an adequate justification for the prosecutor's action.

II. *The Closing Argument*

Early in his closing argument, Marrapese's counsel told the jury that he would not

> stand before you and tell you [that appellant] didn't say on the tape 'tell three lies.' You heard it, you're going to hear it over and over again. One of the charges in this case, however, is the charge of conspiracy. * * * Now you can talk about this three lies conversation all you want * * * but please don't forget that [appellant's alleged coconspirator,] was not in the room.

The counsel then devoted nearly all of the remainder of his argument to the conspiracy charge.

The prosecutor in his closing argued:

> Mr. Egbert started out his argument by conceding the first count of the Indictment. So I think we ought to just put that count with respect to Mr. Marrapese on the shelf for the time being because he concedes the fact that Mr. Marrapese said, "Tell the three lies." And really what the defense is getting down to in this case is the conspiracy count.

Marrapese claims that the district court should have declared a mistrial when he objected to this "inflammatory and highly prejudicial" statement.

The district court denied the request for a mistrial stating:

> Well Mr. Egbert, I'll make two observations. I thought, and I feel certain that the jury thought Mr. Voorhees' argument as being in the nature of an argument, that since you had not argued Mr. Marrapese's guilt or innocence as to Count I of the indictment, that in effect, you were conceding his guilt. That's the way I took it, not that you had ever said you were conceding his guilt. And, number two, there was no contemporaneous objection. If there had been any legitimate question in your mind, and there had been a contemporaneous objection, I might have if I thought there was anything to cure, and I really don't, but I might have done so.

The district judge subsequently, *sua sponte,* instructed the jury that "[t]here is nothing with respect to either count of this indictment . . . which is conceded or should be taken for granted."

There was no mistrial. As the district court noted, the prosecutor's statement was a fair comment on the defense counsel's closing argument. *Cf. United States v. Glantz,* 810 F.2d 316, 323 (1st Cir. 1987) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974)) (the court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury . . . will draw that meaning from the plethora of less damaging interpretations"). Any unfair prejudice from that statement was adequately cured by the judge's instruction. *See United States v. Capone,* 683 F.2d 582, 586-87 (1st Cir. 1982).

III. Sentencing Under the Dangers Special Offender Statute

Marrapese argues that his sentencing under the dangerous special offender statute, 18 U.S.C. § 3575, violated due process and constitutes cruel and unusual punishment. He claims that his sentence in the stolen goods case had already been enhanced because of his obstruction of justice and that for the court then to enhance his sentence in the obstruction of justice case was fundamentally unfair.

In the stolen goods case the prosecutor argued to the sentencing judge that Marrapese deserved more time than the other defendants because he was a professional criminal who was willing to corrupt the criminal justice system to get his way, in contrast to the other defendants who went astray only this time and were remorseful. Thus, in some sense it may be true that Marrapese's relatively long sentence in the stolen goods case was due in part to his obstruction of justice, but the connection is a very weak one. In sentencing Marrapese, the judge stated that he was primarily relying on the presentence report. Further-

more, Marrapese showed a remarkable lack of remorse in his statement to the sentencing judge.[2] Nevertheless, the judge sentenced him to only ten years, far less than the twenty-five year maximum he could have received, and less than the fifteen years the prosecution recommended. That sentence was proportionate to the crime and clearly within the trial court's discretion. It was not an enhanced sentence.

In the obstruction of justice case the prosecution sought, for the first time to enhance Marrapese's sentence

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2 Marrapese's nearly complete statement follows:

* * *

Now my part in this scheme was the least; and I'm guilty. And, your Honor, I would have took a plea if they offered me—they offered me the maximum, your Honor. I had to come to trial.

* * *

Mr. Smith did very well for himself, your Honor, seeing that he was the main perpetrator of this crime; but I have to take it because I'm Frank L. "Bobo" Marrapese, reputed to be an organized crime figure. What would they have done to me if these weren't Lazy Boy chairs? Suppose they were couches? I just want to be fair. I had enough injustice. I want some justice from you.

The minute you let me out on bail Mr. Gale came into the cell back there and tried to proposition me to be a Government witness. Your Honor, everything is falling on me, Frank L. "Bobo" Marrapese, Jr. I'm a little tired of it, your Honor. Your, Honor, I'm here; I'm guilty. I never would have come to trial if they made a fair deal of "X" amount of years in Prison. They want me off the streets; but I had less participation in this crime, the least.

I would just like to say this, your Honor: as far as Mr. Smith, William Smith and Al Smith go, they're just another reason why contraceptives should be used in the home. Now, in the words of Pygmy, your Honor, "Sock it to me. I'm ready for it."

under the dangerous special offender statute, 18 U.S.C. § 3575. Marrapese does not claim that the procedural requirements of § 3575 were violated. Nor does he claim that the sentence he received is greater than § 3575 authorizes. Rather, he claims that § 3575 should not have been applied at all. But, if the procedural requirements of § 3575 are followed, the district court has the same broad discretion to sentence under that statute as under the usual sentencing procedure. *See United States v. Inendino,* 604 F.2d 458 (7th Cir. 1979). Having studied the record in this case and having paid particular attention to the statement of the district court at sentencing, we are fully convinced that the sentence satisfies constitutional norms, *see Rummel v. Estelle,* 445 U.S. 263 (1980), and that the application of the dangerous special offender statute to Marrapese was appropriate.

The conviction and sentence are *affirmed.*

[Deposition of Edwin Gale, 7/25/85]

(p. 36) Q You don't recall telling me that?

A No. At some point I know that I told, I believe, Mr. Sheehan and in the first instance, and perhaps yourself—I have no recollection of that—undoubtedly the Government would be seeking a superseding indictment, which would include additional charges.

Q And that was because the defendants had filed and litigated their motions to dismiss with regard to the grand jury; isn't that correct?

A No.

Q Is it not true that you would not have sought a superseding indictment containing substantive charges had

the defendants not brought motions to dismiss the charges pending against them because of grand jury irregularities?

A No, that is not true. Probably what would have happened, Mr. Egbert, is that had Mr. Marrapese's case gone forward, as it was scheduled for December 3, 1984, he would have been tried, and there would have been some result on Indictment 83-037.

Mr. Cicilline, who had been severed, would have been most likely the subject of a superseding indictment regardless of any motion.

Q Regardless of any motion. And if Mr. Marrapese had been found not guilty on the conspiracy charge, would he have been subject to a superseding indictment, in your opinion?

(p. 37) A Well, of course, all of this is with the benefit of hindsight on an event or events that never occurred; but more than likely, the answer to that would be yes.

Q What was your purpose for telling Mr. Sheehan? You say you don't remember telling me?

A I do not.

Q What was your purpose in telling Mr. Sheehan that these motions, hearings and grand jury challenges were likely going to result in superseding indictments?

A I never told him that.

Q What did you tell him? Tell me exactly what you told Mr. Sheehan and if you can, tell me when you told him and where.

A Can't remember when in that the indictment, what I call a second indictment, which is 85-015S, was returned on January 20, 1985. My best memory is that before—

Q Is that January or February?

A Correction. February 20. That was an error.

Before, during or after a hearing that was being held on a motion, more than likely a grand jury attack motion, I think I mentioned to Mr. Sheehan that regardless of the outcome, there would probably be a superseding indictment with additional charges filed.

Q Regardless? And you are sure those are your words, "regardless of the outcome"?

* * *

[Hearing on Motion to Dismiss Indictment No. 85-015]

(p. 60) Q What did you do?

[Mr. Marvin Loewy]

A I read through it, at least the, yes, I read through it and I approved the prosecution, approved the superseding indictment.

Q Did you have any oral instruction with either Mr. O'Sullivan or Mr. Gale with regard to that prosecution?

A I had discussed the general form of it before the pros memo was sent in.

Q Approximately when was that if you can recall, when did those discussions occur?

A A few weeks prior, I can't say the date.

Q Were they by telephone?

A Oh, yes.

Q Was that with both Mr. O'Sullivan and Mr. Gale, individually or what?

A I don't recall discussing this case with Mr. O'Sullivan. I may have but I have no recollection of it. This was with Mr. Gale.

Q And do you have any notes of that conversation?

A No.

Q Can you tell me what Mr. Gale said to you, please?

A Well, not in specific words but the general tenor of the conversation that he now believed that 1503 was available to him under the facts that he had in this matter and that the law supported our using it and we ought to go (p. 61) ahead and do it.

Q Was that a surprise to you that the law supported that 1503 prosecution?

A No.

Q Even though you had determined in 1983 that Mr. Gale's and Mr. O'Sullivan's assessment of the law was accurate?

A Still didn't surprise me. Sometimes the way the common law works, sometimes a series of Court decisions can enlighten us a lot.

Q Were you aware that in March of 1984 before any of these Court decisions came out, whoever writes the United States Attorneys' Manual, had come to the con-

clusion that 1503 would support a prosecution for non-coercive witness tampering?

A I am aware of that.

Q When did you first become aware of it?

A I can't say, it may have been after my conversation with Mr. Gale.

Q And when you discussed this with Mr. Gale did you discuss the pending motions with regard to, motions to dismiss with regard to Grand Jury irregularities?

A I don't recall a simultaneous discussion. We had discussed the Grand Jury situation here in the past.

Q When was that that you had that discussion?

A I do not recall but it was certainly before I received (p. 62) the pros memo and I believe before we ever discussed, and I believe before we discussed the availability of 1503, but I'm not sure about that though.

Q But you did have a discussion though with regard to the motions which were filed, not in this case, but in the prior Marrapese/Cicilline case with regard to the Grand Jury?

A Well, we were concerned, you know, whenever something arises with respect to a Grand Jury, some irregularity with respect to, that persons other than us are responsible for, such as clerks or commissioners, whoever does that, we're concerned not only with one immediate case, we're concerned with any cases that we might have pending, or for that matter any cases that we may have already tried and convicted in the past. So, I, I generally discuss with my people in the field any general Court conditions that can affect our work. Like, for instance, even if we had done nothing with respect to this case,

we certainly wouldn't have continued presenting new matters to that Grand Jury. So I can't say that I discussed the Grand Jury situation here in specific connection with Marrapese/Cicilline matter. But we certainly did discuss problems with the impanelment of the Grand Jurys here.

Q And did you discuss with Mr. Gale the pendancy of a (p. 63) ruling by the Court with regard to those Grand Jury matters?

A I don't recall that at all.

Q With regard to Exhibit 3 which you have before you, that exhibit reads, at least in part, "A superseding indictment will serve a two fold purpose," is that right?

A Could you tell me where you are, please?

Q The first paragraph.

A Yes, it does contain a two fold purpose.

Q And he indicates to you and Mr. O'Sullivan that one of the purposes is to avoid a possible adverse ruling of the Court, is that correct?

A Yes, that's what he says.

Q I'm sorry?

A Yes, that's what it says.

Q Did you discuss that possible adverse ruling with Mr. Gale?

A To the best of my recollection we would have discussed it but only to the extent that we would have wanted to supersede, not necessarily to avoid an adverse decision by a District Court, but to avoid, for one thing, harassment of a defendant by having him tried before an improperly

comprised Grand Jury and then have it reversed by the Court of Appeals. I mean, so, in other words, when you get one of these improperly impaneled Grand Jury situations, at least as I see it, and lawyers differ, (p. 64) but as I see it, it's really a no win situation because if the District Judge decides with you then all you've got, then you have eight or nine months of holding your breath until you get by the Court of Appeals. So consequently I do not recall any discussions about whether we could win in the District Court. And, again, my recollection could be wrong and subject to contradiction, but my recollection is that when Mr. Gale first heard the substance, the facts of how the Grand Jurys here were being called, he immediately recommended superseding. That was my recollection because I think he thought we were going to have trouble somewhere.

Q So it's your recollection then as soon as Mr. Gale saw what was occurring with regard to these matters, he recommended superseding indictments?

A Those words would not be exactly mine.

Q Give us your words?

A I would be more inclined to say that he took a look in some depth at the facts which were the basis for the Grand Jury motion, and at that point he decided it would be better to supersede than to fight it all the way up. That's my recollection.

Q Is that a subject of any written memorandum to you?

A No, not beyond the pros memo itself. I mean, you know, it's not unusual—go ahead.

* * *

(p. 83) the scope of the issue, whatever Your Honor rules to be the issues as far as this hearing is concerned.

THE COURT: I wouldn't in any event permit the examination to go beyond the scope of these issues, and all that I can say is that if questions are asked that appear to you to go beyond the scope, whether by Mr. Egbert or Mr. Vorhees, tender your objection and call it to my attention.

Q Mr. Cicilline, you are an attorney in Providence?

[Mr. John Cicilline]

A Yes.

Q And during the year 1982, did you represent Frank Marrapese with regard to a prosecution in the United States District Court wherein Judge Watson was the presiding Judge and Mr. Gale was the prosecuting attorney?

A Yes.

Q During the course of those proceedings, did you have occasion to be in the chambers of Judge Watson?

A Yes.

Q And during the course of being in his chambers, was there a discussion by Judge, was there an initiation of discussion by Judge Watson?

A Yes.

Q And could you tell me what Judge Watson said, please?

A Judge Watson asked Mr. Gale and myself whether or not (p. 84) we had discussed a possible plea in this case.

Q And did you respond?

A I did.

Q What did you say?

A I told Judge Watson that the figures that Mr. Gale had mentioned would not be considered by the defendant.

Q And did Mr. Gale respond to Judge Watson?

A He responded to me, I believe.

Q What did he say?

A Something to the effect, "This is what I think of your client" and he produced a photocopy of a reprint from some magazine.

Q And do you have that photocopy here today?

A Yes.

Q I'm showing you this document and asking you if this the photocopy that Mr. Gale gave to you and Judge Watson after making the statement which you've just indicated in 1982 in Judge Watson's chambers?

MR. VORHEES: Your Honor, may I—

THE COURT: Do you object to that question?

MR. VORHEES: I object.

THE COURT: I'll sustain it as to the form of the question, assumes a fact not in evidence.

Q Would you tell me what this document is?

A This is the document which Mr. Gale gave to me. I (p. 85) believe he had several other copies, one of which was circulated to Judge Watson.

Q And is this the document that you refer to as having been produced in Judge Watson's chambers?

A That was given to me by Mr. Gale.

(Document shown to Mr. Voorhees)

MR. EGBERT: I will offer this document, Your Honor.

THE COURT: Mr. Voorhees, Mr. Balliro.

MR. BALLIRO: I have no objection.

MR. VOORHEES: No objection, Your Honor.

THE COURT: Without objection, Exhibit 4, full.

(Photocopy of document marked Exhibit No. 4)

MR. EGBERT: Your Honor, whichever the Court prefers, have the witness read it or the Court read it.

THE COURT: There's no jury here.

(Document handed to Court by Mr. Egbert)

THE COURT: Are you familiar with this document, Mr. Voorhees?

MR. VOORHEES: Yes, I am familiar with that, Your Honor, as most law students are, I believe.

THE COURT: The record will show the Court has read and digested the excerpt clipping from the Gunsmoke Gazette.

(p. 86) MR. EGBERT: No further questions of this witness, Your Honor.

THE COURT: Mr. Balliro, any questions?

MR. BALLIRO: I have no questions of Mr. Cicilline, Your Honor.

THE COURT: Mr. Voorhees?

MR. VOORHEES: No questions, Your Honor.

THE COURT: Thank you, Mr. Civilline, you may stand down. Your next witness, Mr. Egbert.

MR. EGBERT: Your Honor, in a rather bizarre proceeding the next witness is myself and would Mr. Balliro be permitted to examine me?

THE COURT: Hearing no objection, I will permit Mr. Balliro to conduct the examination and you may take the stand.

RICHARD EGBERT, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BALLIRO

Q Mr. Egbert, you're counsel for Frank Marrapese in this case?

A I am.

Q I want to direct your attention to a conversation that you had with Mr. Gale, the prosecutor, the previous prosecutor in this matter, concerning the issue that this

hearing has been about, did you have a conversation (p. 87) with Mr. Gale at some time?

A Yes, I did.

Q And can you tell us when it was?

A It was in the hallway during the course of one of the evidentiary hearings on the motion to dismiss for Grand Jury irregularities during the motions which were filed in the previous indictment. So it would have been either in December of 1984 or January of 1985.

Q Would you tell the Court what that conversation was?

A Mr. Gale came up to me and we were talking about the proceedings basically that were going on. Mr. Gale said to me, and I quote it, but substantially "Why are you proceeding with this motion, I can always reindict if you win." And I said to him that I thought it was important that Mr. Marrapese's rights to a fair Grand Jury be carried forward. And he indicated to me, well, if you persist in this motion, all right, I just may reindict him and add some substantive charges. That was the extent of the conversation.

MR. BALLIRO: That's all I have, Your Honor.

THE COURT: Mr. Voorhees, any examination of Mr. Egbert?

MR. VOORHEES: Would the Court indulge me a moment, Your Honor.

THE COURT: Yes, I will.

* * *

(p. 104) it.

Q Was there any written report of the events which occurred on December 3?

[Mr. Lincoln Almond]

A No.

Q Did you make any memorandum with regard to those events?

A No.

Q Did you discuss with Mr. Gale the possibility of an adverse ruling by Judge Selya with regard to the Grand Jury challenge?

A Yes.

Q And when did you have that discussion?

A I'm going to guess, it was well into 1985 and it was or would have been after all of the briefs had been filed because I recall taking all of the briefs for the Government and for the defense home and reading them all and then scheduling a conference with Mr. Gale.

Q Now you say, am I right, that before you ever read those briefs you and Mr. Gale had agreed on superseding indictments and you had approved same?

A I would say in my mind—

Q Not your mind, you had a meeting with Mr. Gale you said.

A No question.

Q Did that meeting occur before you took home those briefs?

A Yes.

Q Long before?

(p. 105) A This would have occurred at the latest mid January.

Q That's the latest in terms of your decision with Mr. Gale?

A My mind was that Mr. Gale discussed with me his research on the Lester case a couple of weeks after I gave him the Lester case and told me it was viable. And in my mind at that time if he said to me "I'm going tomorrow" I would have said "go ahead, I approve." In my mind I approved.

Q But didn't you just indicate you had a conversation where you did approve?

A Sure.

Q When was that?

A Right at that time, go ahead.

Q Mid January?

A Go ahead.

Q And at that time did you indicate to him to stop wasting the Court's time with these motions and briefs and the like and to go ahead and do it and to report it to the Court that he'd be indicted?

A That was my feeling, go ahead.

Q Did you instruct him to do so?

A Sure.

Q So you instructed him to go to the Court and indicate to the Court that there would be a superseding indictment and everything should be stopped?

(p. 106) A I don't think it was immediately. I think he did a pros memo, he did some more research. I'll say in my mind the issue was resolved and shortly after that I believe he advised defense counsel of his intention to seek a superseding indictment. I think he reported that to me.

Q Were you present when he advised defense counsel of that?

A I don't know, I don't remember.

Q You don't remember if you were present?

A I may have advised Mr. Sheehan.

Q You know, Mr. Almond, you may have done a lot of things but—

A I remember discussing—

Q Do you have any memory of advising Mr. Sheehan?

A I have a memory of having a discussion with Mr. Sheehan.

Q What was that discussion?

A That there was going to be a superseding indictment coming down.

Q When did that discussion take place?

A Sometime in 1985.

Q When?

A I couldn't tell you exactly when.

Q Was it before briefs were filed?

A It was either-I was present with Mr. Gale or I in fact told him, I'm not sure.

* * *

(p. 124) minutes to check now.

(Whereupon brief colloquy transpired between Court and counsel as to reaching Mr. Gale by telephone in Los Angeles for a five-fifteen telephone deposition. Chambers proceedings concluded—Reconvened in Courtroom)

THE COURT: You may proceed.

JOHN F. SHEEHAN, having been first duly sworn, called as a witness by defendants, testified as follows:

DIRECT EXAMINATION BY MR. BALLIRO

Q Mr. Sheehan, your profession is that of attorney at law?

A Yes, I am.

Q And you are co-counsel with myself in representing John Cicilline?

A That is correct.

Q I want to direct your attention, Mr. Sheehan, to a time when there was some discussion concerning the return of a superseding indictment in this case and ask you whether or not you recall having such a conversation with members of the prosecution team?

A I believe I had the conversation with both Mr. Gale and Mr. Almond, but I'm not that sure about Mr. Almond, but I understand he said I did so I think I did.

Q You don't dispute the fact that you did if he so testified?

A No, I do not.

Q And do you have a memory as to when and where you had (p. 125) those conversations?

A It would be in this Courthouse, not necessarily the Courtroom but the Courthouse, and it was during the time of the challenging of the Grand Jury.

Q And first with Mr. Gale, you seem to have a memory of a conversation with Mr. Gale?

A I believe I had a conversation either in this Courtroom myself during a recess or outside the Courtroom, and I suspect that it was at a time when Mr. Cicilline wasn't here because I related the conversation to Mr. Cicilline I recall that afternoon. Which afternoon I don't know obviously.

Q Would you tell us please what that conversation was?

A With Mr. Gale?

Q Yes.

A There was some general conversation about the challenge to the Grand Jury. There was a general conversation about its creating a lot of problems for everybody and where are we really going with it, that he would bring a superseding indictment if necessary and it could have additional charges. And I remember specifically calling Mr. Cicilline on that, that last point, the additional charges.

Q You made a point of relaying that to Mr. Cicilline?

A Yes.

• • •

[Mr. Jeremiah O'Sullivan]

(p. 139) A Yes, orally he had talked to me about doing this and I had read Lester and Judge Glasser's case in the Eastern District, Beaty, and another case in the Fifth Circuit. I had read the cases and had talked about the theory with him before it was ever reduced to writing.

Q And do you have any idea how long before it was reduced to writing you had those conversations?

A Two weeks, ten days, a week. It wasn't very long actually.

Q Were you aware that in December of 1984, the case of United States versus Marrapese was suspended because of an attack upon the jury and Grand Jury selection process?

A I don't think I was specifically aware of that. Maybe I might have been at the time, but I do not have a specific memory now of being aware of it at the time.

Q Do you have any recollection of you being made aware of the ongoing Grand Jury attack, forgetting the December 3 suspension, but as it was ongoing?

A I have a vague recollection of Mr. Almond at some point in some conference, I might have met with him, mentioned there was some problem with the Grand Jury that put some of their cases in jeopardy, but I don't have a specific memory of ever discussing with Mr. Gale at that

time or specifically as it relates to this case. But that's not to say I didn't.

(p. 140) Q You just don't have a memory at this time?

A Correct.

Q When you received this memorandum of February 14, 1985, did you approve of it?

A Yes.

Q Was there anything in it you did not approve of?

A Not off the top of my head. I read it quickly and approved it because, I'm sure I didn't give it much thought in terms of analyzing it in any detail since I had read the cases and had approved Mr. Gale's, orally had approved what Mr. Gale was proposing beforehand. So I probably just skimmed it fairly quickly and didn't even spend any time on it.

Q When Mr. Gale spoke with you orally with regard to these matters did he tell you that this superseding indictment would serve the purpose of avoiding any possible adverse ruling by Judge Selya?

A Possible adverse ruling by Judge Selya—

Q With regard to the Grand Jury selection?

A I can't remember specifically. He may have but I don't have a specific memory of that.

Q Without regard to oral now, but at least in the memorandum he did discuss that purpose, did he not?

A I saw it downstairs, I saw a one liner in there someplace quickly as I went through it.

(p. 141) Q Why don't you read the first paragraph to yourself so you can at least familiarize yourself with it.

A Okay, I see that, the first paragraph.

Q And did you approve of the language by Mr. Gale which indicates that in the first instance we will avoid potentially adverse decision by Judge Selya, et cetera?

A Did I approve of that?

Q Yes.

A I suppose to the degree that I approved of the superseding indictment, I approved of it. That wasn't the reason, at least, that I understood they were returning a superseding indictment, but to the degree that my approval of the superseding indictment had the operative effect of doing that I suppose I approved of it.

Q And in your capacity as Chief of the strike force in Boston, do you approve of the, generally, do you approve of using the superseding indictment to avoid a judicial determination of pending motions by a defendant?

A It would depend on what the motion was. It would depend on a whole lot of different factors.

Q With regard to this particular case where a Court is ready to rule on a motion to dismiss for improperly constituted Grand Jury, or improperly selected Grand Jury, do you approve of using a superseding indictment to avoid the decision of the Court in that regard?

(p. 142) A As a hypothetical question?

Q Yes.

A I don't know, I'd have to think about that. You're asking me a question, it's not an ultimately dispositive mo-

tion in the sense that it can be, a new indictment can be returned and so forth, so I don't know, I'd have to think about that a little bit. I can't give you a ready answer.

Q When you saw in this memorandum that Mr. Gale had indicated the purpose of the new indictment are two-fold and in the first instance to avoid a potentially adverse decision by Judge Selya before whom the present indictment is pending relative to the '82 Grand Jury which returned the first indictment was illegally constituted, when you saw that and approved of it did you give it the kind of thought that you are indicating now is necessary for you to answer my hypothetical question?

A No, I was focusing on the superseding indictment as it related to the issue of 1503, the residual clause under the old statute which Mr. Gale, at least, in the cases indicated was still operative under the revised statute. I didn't focus on the Grand Jury issue at all to be honest.

Q Do you and your subordinates receive United States Attorneys' Manuals?

* * *

[By Mr. Egbert]

(Vol. 2, p. 2) time in some ways refashioned and expanded upon the various obstruction of justice Statutes known as 18 United States Code 1503 and 1510 and 1512 particularly. Throughout the period that both before the October '82 amendment and after the so-called omnibus clause, which is the last sentence in 18 U.S.C. 1503, remained in full effect and intact, unchanged. The original prosecution of this case was brought pursuant to a conspiracy to suborne perjury charge, and I'll leave out the charges as to Mr.

Schivolla, I believe they have no bearing upon this case. And I can envision, at least in my mind, a reason beyond what's stated in the prosecutorial memorandums, and although it may, I think of the *Marlar* case in the First Circuit where the Defendants think of the government has impressions to think so far ahead to make a problem for a Defendant, but I do think that one of the reasons may well have been that the case was brought on a singular conspiracy as it related to Mr. Marrapese and Mr. Cicilline was for this reason: and that is that had the government brought a case, as has been brought now, including the substantive charges, the chances of convicting Mr. Cicilline would be even less. And I suggest to the Court, and I will continually suggest to this Court, that the government's prime (Vol. 2, p. 3) motivation in the case was to convict John Cicilline. And had the government, originally the government went to trial on a case involving a singular conspiracy between Marrapese and Cicilline. There was no question, and I recall the Court's comments to me, and I can't help but remember them because there was no question about them, but the Court said to me at one time and jocularly, and I attribute no motivation of the Court, I'm anxious to see Marrapese's defense in the conspiracy case based on the tape because clearly the substantive conduct was there. But the government knew that if they tried Marrapese and Cicilline together, that the jury would see clearly the substantive conduct of Mr. Marrapese and fall to the argument that Cicilline did not conspire. It would give the jury something to convict Marrapese on and it would give an out to Cicilline. And I looked at the case that way quite frankly from the beginning as did Counsel for Mr. Cicilline as we spoke about it. It's very

hard for me to fathom that someone who has been categorized as one of the finest criminal lawyers in the United States Department of Justice system, that someone who has been categorized as one of the finest chiefs of field offices in the Department of Justice system, never (Vol. 2, p. 4) bothered once, if this case was of import to them as they state, to read the congressional record, to read the administrative news, to read their own updates in the United States Attorney's Manual in March of 1984, to read and interpret what three other United States Attorney Offices did and brought cases upon. It shocks my understanding of the criminal justice system.

THE COURT: Of course, in fairness, Mr. Egbert, much of what you just referred to is matter that was not available, no matter how diligently one searched when this case was first presented to a Grand Jury in 1983. And it seems to me that there's a different quantum in what one might expect as far as analysis which underlies the decision as to how to attempt to shape an Indictment in the first instance and the degree of attention one gives to emergent theories of law not directly related to the counts of the Indictment once a prosecution is under way. In other words, if the March 12th, 1984 Justice Department Manual had not been dated March 12th, 1984, but had been in the U.S. Attorney's Manual at the time, Mr. Gale and Mr. O'Sullivan and Mr. Lowey decided to indict without reference to 1503, but if the *Lester* case had been on the books at the time, if the *Beaty* case (Vol. 2, p. 5) had been on the books at that time, none of which is so, I think we have a somewhat different flavor to the controversy, if not a different case.

MR. EGBERT: I don't disagree with the Court. I think certainly that quantum of evidence would be substantially different. But what we do have is a Statute that in terms of the Statute ultimately indicted under, 1503, was unchanged, was totally unchanged. Now, the fact that Mr. Gale saw that witnesses were removed from portions of this Statute and put into 1512 does not change the fact that the omnibus clause remained, that all decisions under the omnibus clause pre-October, 1982, when I say all decisions, the substantial body of law with regard to the omnibus clause was that non-coercive witness, getting a witness to lie in a judicial proceeding was affecting the due administration of justice and was prosecutable under 1503. The fact that Mr. Gale did not, I mean, the fact that a Prosecutor said, "No, I won't prosecute under that because they removed witnesses from another portion of that Statute and I won't look at the congressional record and I won't look," and he testified in deposition that he never looked at any of the cases which came down pursuant to the omnibus clause pre-1982, (Vol. 2, p. 6) pre-October, 1982, is suggestive of the fact, I suggest to the Court, of at least, at least negligence, and I'll start at that point. They then try the cases in what I think, if any case can be called a tortured history, I think this case can, and if any case can be called one in which the Prosecutor and the Defendant, Marrapese, not the Defense Counsel, but the Defendant, Marrapese, had numerous ongoing run-ins, ones which are typical of a Prosecutor direct with a Defendant, this is the case. And I would suggest this follows: first of all, when Mr. Gale handed to Mr. Cicilline the article from Judge Roy Bean, or whoever, I think it's Exhibit 5, and I'm not sure, if your Honor please, but it's an

exhibit in this case, during his discussions before Judge Watson in the so-called chairs case, it evidenced, if nothing else, an animosity beyond the normal prosecutorial function. It was to villify a Defendant. It was not to say to a Judge, "I want sentencing for a particular reason." It was to in a jocular fashion deal with another man's life in such a way as to evidence a dislike, animosity, a personal distaste. That personal distaste was carried over to, and I believe rightfully can be carried over, to the time when Mr. Gale walked into Mr. Marrapese's cell block (Vol. 2, p. 7) and had a conversation which became a matter of a motion before this Court in the prior case. But at that time he testifies Marrapese swears at him, hollers at him and the like, and thus building the personal animosity. From that point on Mr. Gale was charged with prosecutorial misconduct by the defense in this case on at least three separate occasions. All of them being serious, the case was hard fought and those motions were turned down or rejected by the Court.

The case went to trial in December of 1983 and, frankly, I suggest that Mr. Gale ends that trial with egg on his face. And the egg on his face is because his prime witness has changed his testimony. There is evidence at a hearing before this Court that Mr. Gale did not properly prepare that witness. I don't have the Court's remarks before me but I believe the Court did say that although you did not find him to be, to rise to the height of prosecutorial misconduct, you did believe or you did find that the prosecution in that case failed to properly prepare their case, at least in what you may consider to be the proper manner for United States Attorneys. It is I believe failing human nature not to take into account the continued attacks on

Mr. Gale when it goes to his (Vol. 2, p. 8) attentions in this regard.

After the December 1983 mistrial, of course, there was an appellate review and then Marrapese goes to trial alone in March of 1984. In that trial, the government came into the case, and I think it's fair to say, this Court tried it, in a posture of what I believe to be a no lose situation and resulted in a deadlocked jury.

Then, of course, the June, 1984 trial of Cicilline, another aborted event in the government's arsenal to try to get these people in jail when a deadlocked jury again was caused and a mistrial declared. There was various posturing after that as the Court might recall with regard to prejudice and pre-trial publicity, with regard to a hearing as to whether or not Mr. Gale had improperly given information to the press which would have caused the publicity. Again, an attack by the defense upon Mr. Gale. Thereafter, if your Honor please, and we, of course, have the situation—strike that, I want to go back a second if I may. During the March of 1984 trial of Marrapese, Marrapese lays all his cards on the table so to speak by way of trial strategy. I don't think there can be any doubt about that. He argues to the jury that Mr. Marrapese committed (Vol. 2, p. 9) the crime by himself of the substantive offense, that he did not conspire with anyone, that the government didn't charge him properly and, therefore, he should be found not guilty. The government, in fact, filed a motion before this Court after that trial, it's one of the proceedings that was going on, to bind Defendant and Defense Counsel to that theory if you recall. There was posturing by the government, and I'm frank to say that

I forget which motion it was in regard thereto, but the government filed a brief indicating that I should be held to the comments I made to the jury that they were in fact the Defendant's words through his agent and that if I were to use a different theory of defense that the jury should be told that on another occasion I argued that Mr. Marrapese had in fact done the acts and the like, and argued that at some length to the Court. Not until, not until, in fact, even after December 3rd, 1984 when we were scheduled to go to trial, Marrapese was scheduled to go to trial on the single count of conspiracy and Mr. Gale testified yesterday at the continued deposition, that had that case gone to trial on December 3rd, Mr. Marrapese would have been tried on the conspiracy charge alone and, in fact, the government was there to impanel that day and try it